In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-278

JAMES HUEL CRAVENS AND RAYMOND M. TAYLOR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioners were convicted of having possessed an unregistered still and distilling apparatus, in violation of 26 U.S.C. 5601(a)(1), having willfully and knowingly carried on the business of a distiller without bond, in violation of 26 U.S.C. 5601(a)(4), and having willfully and knowingly made and fermented approximately 300 gallons of mash whiskey on premises not lawfully qualified to produce distilled spirits,

in violation of 26 U.S.C. 5601(a)(7). At the conclusion of the government's case, a co-defendant, William Glenn Kilgore, entered pleas of guilty to each of the three counts (T. 124; Pet. App. A27-A29). Petitioners were sentenced to concurrent terms of eighteen months' imprisonment. The court of appeals affirmed (Pet. App. A1-A2).

On May 24, 1971, federal agents established surveillance of a barn near Princeton, Kentucky, owned by one Hercules McGowan (T. 39, 118, 120). Five days earlier, petitioner Cravens and co-defendant Kilgore had attempted to rent from McGowan an unoccupied farmhouse near the barn (T. 120). Surveillant agents detected the odor of fermenting mash emanating from the barn, observed heat waves rising from the roof, and heard sounds of buckets being dipped into barrels (T. 42-44, 90). Petitioners and Kilgore were observed in and around the barn (T. 39). Petitioner Cravens and Kilgore were seen departing the barn in separate automobiles (T. 41, 88, 91).

A search warrant was executed on May 26, 1971, and a 228-gallon still was discovered in the McGowan barn (T. 39, 51, 93). At the time of his arrest, petitioner Cravens complained that his still was small in comparison to one in operation nearby (T. 15, 61, 65; Pet. App. A18). Kilgore, at the time of his arrest, admitted that he and petitioners had operated the still behind Cravens' house before moving it to the barn (T. 67, 70, 113; Pet. App. A21-A22). Petitioners' objection to this testimony was overruled and

a limiting instruction given that this statement was not to be considered with respect to petitioners (Pet. App. A22-A23). Kilgore also stated, with respect to operation of the still, that petitioner Taylor had furnished the copper condenser and cooling tank and petitioner Cravens the bottle gas and cooking pot (T. 71; Pet. App. A24). When petitioner Taylor was arrested, he asked whether the agents had observed the still from across the road and whether they had taken pictures (T. 72, 96).

1. Petitioners, relying on *Bruton* v. *United States*, 391 U.S. 123, contend (Pet. 5-7) that because Kilgore's statements incriminated them, receipt of the agents' testimony about those statements violated their Sixth Amendment right of confrontation. However, petitioners were observed in the barn, where a still was subsequently discovered, during a period in which outward manifestations (*i.e.*, odor of fermenting mash, heat waves and the sounds of buckets being used to haul liquid) established operation of a still, and at the time of their arrests, both petitioners made statements which indicated their involvement in the operation of the still. Thus there was overwhelming evidence apart from Kilgore's statements to support petitioners' convictions. Under these circumstances, introduction of the Kilgore admissions was, as the court of appeals concluded (Pet. App. A2), harmless beyond a reasonable doubt. *Harrington* v. *California*, 395 U.S. 250. See also *Alley* v. *United States*, 426 F. 2d 877, 880-881 (C.A. 8); *United States* v. *Levinson*, 405 F. 2d 971, 987-988 (C.A. 6), certiorari de-

nied *sub nom. Strang* v. *United States*, 395 U.S. 906.[1]

2. Petitioners further contend (Pet. 7) that the trial court's failure to afford them a hearing on the motion to suppress was error. But petitioners' motion and accompanying memorandum of law (Pet. App. A7-A11), filed the day before trial, contained no factual allegations and merely challenged generally the sufficiency of the warrant and the affidavit in support of the warrant. Thus, an evidentiary hearing was not required. *United States* v. *Culotta*, 413 F. 2d 1343, 1345 (C.A. 2), certiorari denied, 396 U.S. 1019; *United States* v. *One 1965 Buick*, 392 F. 2d 672, 678 (C.A. 6); *Cohen* v. *United States*, 378 F. 2d 751, 760 (C.A. 9), certiorari denied, 389 U.S. 897.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

---

[1] The court of appeals (Pet. App. A1-A2) reasoned that when Kilgore pleaded guilty at the conclusion of the government's case, he became available to the defense for examination since he could have been called to the witness stand and that petitioners' right of confrontation was, therefore, not abridged. See *Nelson* v. *O'Neil*, 402 U.S. 622. But not yet having been sentenced, Kilgore might have invoked his privilege against self-incrimination if called upon to testify. The question whether petitioners should have attempted to examine Kilgore with respect to the admissions as a predicate to any claim of prejudice based upon denial of an opportunity to confront the witness need not be reached here in view of the alternative ground for rejecting petitioners' claim.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 476874 172